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JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Petition for certiorari was filed in this Court on October 14, 1954 and certiorari was granted on December 6, 1954.

The judgment of the Appellate Department of Superior Court was pronounced on July 1, 1954, and a petition for rehearing was denied on July 16, 1954.

The Constitutional issue now being presented was raised in the trial Court and the Appellate Department of Superior Court.

QUESTIONS PRESENTED.

Whether the means employed by state police to cause the involuntary extraction of blood from petitioner to determine sobriety and the use of the results of such a blood test as evidence of intoxication in a state prosecution for driving a motor vehicle while under the influence of alcohol violates the Due Process Clause of the Fourteenth Amendment under the circumstances of the instant case.

(i) Where the petitioner protests and refuses his consent to taking such blood test,

(ii) where the blood sample is extracted by police personnel from the petitioner by means of coercion and force,

(iii) where the police officers deny petitioner his request to consult his attorney or doctor during the

time that the officers are compelling petitioner to submit to the blood test,

(iv) where the results of a blood test taken in such a manner are admitted in evidence against petitioner through an expert witness who testifies that he does not know who made the analysis indicating the alcoholic content of petitioner's blood, and

(v) where trial Court fails to give any instructions on the issue of voluntariness of the blood test.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE.

I. Procedural History of the Case.

The petitioner was charged with violation of Section 502 of the Vehicle Code of the State of California, which provides that driving under the influence of intoxicating liquor is a criminal offense. A trial was had on November 18, 1953 without a jury despite the demand for jury by the petitioner. On appeal before the Appellate Department of the Superior Court, the lower Court was ordered to grant petitioner his right to a trial by jury. On April 7, 1954, petitioner was tried and convicted before a jury on the same charge.

The sentence of the lower Court after trial without a jury and after the lower Court found petitioner guilty of violation of said Section 502 was as follows: $150.00 fine and 30 days in the county jail suspended with one year probation with no suspension of the driver's license. As a result of petitioner insisting upon his constitutional right to a jury trial under the state constitution, the sentence by the same judge for the same offense after verdict of guilty was as follows: $500.00 fine and 90 days in county jail, 5 days to be served with 85 days suspended, three years probation, and driver's license to be suspended for 90 days.

The Appellate Department of the Superior Court affirmed the judgment of conviction on July 1, 1954 and denied a petition for rehearing on July 16, 1954. Petitioner has no further remedy for appellate review in the state courts of California.

II. The Facts Material to the Questions Presented.

The petitioner, after being stopped by the California Highway Patrol while driving his automobile on the public highway, south of Palo Alto, California, was taken to the Accident Investigation Bureau in San Jose (R. 40), where he was requested to submit to various tests for sobriety. (R. 42.) The officer, the technician, and the petitioner all testified that the petitioner refused to submit to these particular tests. (Officer Shannon, R. 42; Technician, R. 51, 52; petitioner, R. 81, 82.)

The petitioner was then asked to submit to a blood test wherein a sample of his blood was to be extracted

from his arm. (R. 17, 18.) The petitioner continuously protested and refused to submit to the taking of his blood. (R. 82.) Petitioner testified that his blood sample was extracted against his will (R. 82) and as a result of implied threats and compulsion exercised in the form of persistent demands on the part of the police officers that petitioner had to submit to the test and that he had no other choice. (R. 104, 105.) One of the police officers rolled up his left sleeve and held his arm while the technician injected the needle. (R. 105.) Petitioner testified that he continued to protest but did not resort to physical resistance because he did not wish to aggravate the situation. (R. 105.)

The police officer Shannon testified that the petitioner objected repeatedly to undergoing a blood test and that he was uncooperative and somewhat belligerent. (R. 42.) Officer Shannon testified further that petitioner asked to call and consult "someone—I cannot remember whether it was his doctor when it came to taking the blood sample, or whether it was his attorney * * *" (R. 43, 44), and that petitioner's request to consult his doctor or his attorney was denied by the officers conducting the investigation. (R. 44.)

The police technician Hamre testified that the petitioner was belligerent and uncooperative in his attitude just prior to the extraction of the blood sample and that petitioner had refused to submit to the test twice before the blood was actually taken. (R. 53, 54.) After petitioner was refused legal or medical advice,

the officers testified he did not object further to the blood test and consented. (R. 42, 52.) The technician is not definite in his recollection whether a police officer held petitioner's arm. (R. 54.) No analysis of petitioner's blood was made by police technician Hamre. (R. 55.) Whoever made the analysis was not established by the respondent. (R. 34, 35.) The criminologist Bradford testified his records did not show who made the analysis. (R. 24, 34.) Nevertheless, the respondent's Bradford was allowed to testify as to the alcoholic content of the purported sample of petitioner's blood. (R. 24.)

SUMMARY OF ARGUMENT.

Coercion used to extract a blood sample from the petitioner violates the Due Process Clause, as did the use of the blood sample as evidence to convict him.

(A) Coercion is equally offensive whether employed to extract real or verbal evidence over the protest and against the will of the accused. The extraction of either real or verbal evidence by force equally offends the community's sense of fair play and decency. Not only confessions obtained by torture and brutality but also confessions obtained by other sufficiently coercive methods have been condemned as violative of Due Process. So with real evidence, its extraction can be repugnant to Due Process even though the coercion does not consist of gross physical violence and brutality.

(B) Coercion was used by State Police to extract from the petitioner a blood sample. The petitioner repeatedly refused to submit to the blood test; requested an attorney or doctor and was refused by the police; had his arm held by the officer while a technician injected the needle and withdrew the blood. Petitioner continued to protest but did not resort to physical resistance.

(C) *Rochin v. California* applies to the facts of this case: The forcible extraction of blood from petitioner violates due process and the blood sample was inadmissible.

The dignity, integrity, and privacy of the individual are equally violated by the forcible entry into his body of the stomach pump or of the needle for blood. The forcible entry in either manner constitutes an assault. The use of force in this case is sufficiently shocking and offensive though less violent and brutal than *Rochin*.

Rochin should not be limited to cases of gross violence and brutality; otherwise, a premium would be placed upon violence and only the constitutional rights of the bully accused would be protected. The accused who protests forcible entry into his body, but does not resort to physical resistance should not be precluded from the protection of due process.

The forcible intrusion by the police into the body of the individual to extract real evidence against his will under coercive circumstances is the conduct that violates due process. Stomach pumping (gastric

lavage) as a medical procedure is frequently used by civilized medical men and is not itself a brutal, shocking, unfair or indecent technique of a medieval barbaric nature. It is its forcible use by the police against the will of the accused that is offensive. Likewise, the forcible use of the needle by the police to puncture the skin, tissue, and veins of petitioner against his will is what shocks and offends our community's sense of fair play and decency.

(C) The evidence of the blood test was unreliable and should have been excluded. The prosecution never established who made the analysis of the blood sample extracted in this manner. Such evidence should have been excluded when its unreliability was considered together with its improper extraction.

(D) The petitioner's privilege against self-incrimination was violated when his blood was extracted against his will. The use of force to extract evidence from the veins of petitioner without his consent compelled him to be a witness against himself in violation of the Fifth and Fourteenth Amendments.

(E) The forcible intrusion upon the person of the individual by state police in this case requires the exclusion of the evidence extracted from the body and a reversal of the conviction. The great concern of this Court for the security of the individual in his person and property has been expressed in *Wolf, Rochin,* and most recently in *Irvine v. California.* The sanctity of the person has been protected to a greater degree than the security of the individual's

property. The use of coercion to invade the person for the extraction of real evidence under offensive circumstances will result in the exclusion of the evidence and the reversal of the conviction. Intrusion upon the privacy of the individual as to his property has been condemned but the fruits of the search have not been rendered inadmissible and the conviction reversed. In this case, the person of petitioner was affronted by the forcible intrusion of the police. The evidence should be excluded and the conviction reversed.

(F) Failure of the trial Court to give petitioner's requested instructions relating to the voluntariness of the blood test and the application of Rochin was a violation of due process. While the record in its entirety clearly establishes petitioner's blood was extracted by the use of coercion, respondent contends the officer's testimony reveals the consent of petitioner. The trial Court did not present to the jury any instructions relating to voluntariness of the blood test in accordance with California procedure. Such failure to give such an instruction deprives petitioner of an adjudication on the issue of voluntariness and is a violation of due process of law in accordance with the rule of this Court.

ARGUMENT.

THE COERCION USED TO EXTRACT A BLOOD SAMPLE FROM THE PETITIONER VIOLATES THE DUE PROCESS CLAUSE AS DID THE USE OF THE BLOOD SAMPLE AS EVIDENCE TO CONVICT HIM.

The coercive means employed by the state police to cause the involuntary extraction of blood from petitioner to determine sobriety violates the Due Process Clause and caused the evidence of the blood sample to be inadmissible.

Rochin v. California, 342 U.S. 165 (1951).

(A) Coercion Is Equally Offensive Whether Employed to Extract Real or Verbal Evidence Over the Protest and Against the Will of the Accused.

The equally offensive nature of coerced real or verbal evidence was recognized by this Court in the *Rochin* case:

> "To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. * * *"
>
> Mr. Justice Frankfurter for the Court in *Rochin v. California.*

Due process of law does not mean that evidence extracted by force from the body can convict a man, but evidence extracted by force from his mind cannot.

Confessions obtained by torture and brutality have been found repugnant to Due Process.

Brown v. Mississippi, 297 U.S. 278 (1936).

The use of coercion to obtain confessions without physical torture and brutality has been held by this Court a violation of Due Process where the other coercive methods employed were inconsistent with our basic concepts of fairness and decency.

Watts v. Indiana, 338 U.S. 49;
Turner v. Pennsylvania, 338 U.S. 62;
Harris v. South Carolina, 338 U.S. 68;
Leyra v. Denno, 347 U.S. 556.

Thus, gross physical violence and brutality should not be the only criteria for the condemnation of forcible extraction of real evidence from the body where other equally repugnant elements of coercion are present.

(B) Coercion Was Used by State Police to Extract From the Petitioner a Blood Sample.

All witnesses including the police and the petitioner agree that the petitioner refused to submit to the blood test upon being taken to the police station. (R. 42, 54, 82.) Petitioner asked to consult an attorney or a doctor before submitting to the blood test but was refused. (R. 43, 44.) While the petitioner continued to protest and refused to submit, one of the police officers rolled up his sleeve and held his arm while the police technician injected the needle and extracted the blood. (R. 105.) The police officers told the petitioner he had no other choice except to submit to the blood test. (R. 104, 105.)

Coercion was applied when petitioner was told he had to submit to the test "or else". The refusal to allow him to seek independent advice either legal or medical served the further purpose to indicate to the petitioner at the time he could not refuse to submit to the test and must remain at the police station until he was compelled to give his blood. Notwithstanding this coercion, the petitioner continued to protest as the officer applied the force needed to prepare his arm for the injection and the other officer applied the needle. Force was used when the officer held petitioner's arm, needle was injected into his skin, tissue, and vein by the technician, and his blood withdrawn.

(C) Rochin v. California Applies to the Facts of This Case: The Forcible Extraction of Blood From Petitioner Violates Due Process and the Blood Sample Was Inadmissible.

The forcible extraction of blood from the veins of the petitioner against his will is as offensive to "the community's sense of fairness and decency" as was the extraction of narcotic capsules from the stomach of Rochin, "The right to privacy * * * [which is] implicit in the concept of ordered liberty" (*Wolf v. Colorado,* 338 U.S. 25) applies equally to a man's veins and to his stomach. The police technician's forcible puncture of petitioner's skin, tissue, and vein with a needle over his protest and against his will is as offensive and shocking to the dignity and the integrity of the individual as is the use of the stomach pump by the police doctor upon Rochin. Both procedures under these circumstances constitute an as-

sault upon the person with inner penetration of the body; both result in the physical debasement of the individual; and both deny the accused the dignity and the privacy of the individual required by our concept of the individual's relationship to the State.

In view of these considerations, we disagree with respondent's contention that the facts of petitioner's case are not sufficiently brutal and shocking to come within the *Rochin* doctrine.

The use of force to extract blood under the circumstances of this case satisfies the criteria of *Rochin*.

While the petitioner did not resort to violent physical resistance, and thus did not provoke further more violent restraint being imposed by the officers upon him, the force and coercion that were in fact used were no less repugnant to the fundamental constitutional guarantees of the petitioner. The coercion found in this case shocks the conscience and offends our sense of fairness though accompanied by force more slight and subtle than found in the *Rochin* case. The enforcement of the constitutional rights of a defendant cannot be reserved for the bully defendant whose violent propensities cause more overt physical resistance to the compulsion of the officers.

The petitioner's own language best explains his state of mind when the officers seized his arm and commenced to take the blood sample: "The only way I could object to it physically was to shove them away, and that would have aggravated the situation." (R. 105.)

The peaceful defendant such as the petitioner should not be penalized for his failure to strike and kick the officers, where he persistently protests and refuses to submit to the blood test and the officers seize his arm and inject the needle against his will. Otherwise, a premium would be placed upon violent resistance, and only the ruffian's constitutional rights would be safeguarded by the Courts. The coercive conduct of the police in obtaining the evidence does not become less offensive because the defendant's refusal to submit is less violent. Such police conduct as found in the instant case comes within the doctrine of the *Rochin* case as violative of the petitioner's constitutional rights.

Limitation of *Rochin* to cases of gross physical violence and brutality will have unfair and unjust consequences.

Suppose the police desire to extract from a suspect's body certain "real evidence" by way of a blood test, stomach pump, catheter, or some other procedure of modern medicine. The suspect refuses to submit to the procedure required to extract the desired evidence. He does not give his consent. Nonetheless, the officer, technician, or doctor commences the necessary acts to extract the evidence. The suspect continues to protest without result. Several alternative possibilities can result thereafter.

First, the suspect can physically resist the attempt to enter his body. The officer, technician, or doctor stops and abandons the effort to extract the evidence. The suspect has thus enforced his refusal to submit

by his own violence. In a sense, due process would be obtained by vigilante methods.

Secondly, when the suspect physically resists, the officers themselves resort to more violent force to restrain the suspect. The degree of brutality and violence would in no small part depend upon the strength of the respective participants and the persistence of the suspect. The evidence thus obtained through gross physical violence would undoubtedly be inadmissible under *Rochin*.

Thirdly, when the person conducting the procedure persists in proceeding, the suspect continues to protest but does not resort to physical resistance. The evidence is thus obtained by forceful entry into his body against his will.

Would it not indeed offend our concepts of fair play and decency if *Rochin* was so construed that the suspect in the third situation would be the only one against whom the evidence could be used to convict. Undue emphasis upon the presence of excessive force and physical brutality could lead to such an application of *Rochin*. No person whose body the police seek to enter by force against his will and over his protest should be compelled to resort to violent physical resistance of the police officers before he can be heard to invoke the protection of the Due Process Clause. To require forcible resistance as a necessary prerequisite for the Court's intervention would result in a perversion of the Due Process Clause. It would invite violence on the part of the accused before he could assert his constitutional rights and

possibly more violent restraint on the part of the police officers. Peaceful cooperation of the accused with law enforcement officers would be discouraged. Clearly, such a limitation of *Rochin* would not make for a more ordered administration of criminal law enforcement by the states.

The forcible intrusion by the police into the body of the individual to extract real evidence against his will under coercive circumstances is the conduct that violates Due Process. The medical procedure itself is not necessarily what is shocking, brutal, and offensive but rather its use by the police to reach into the suspect's body against his will that is repugnant to Due Process. *Rochin* stands for more than a condemnation of stomach pumps in state criminal law enforcement. We concede, of course, that stomach pumping is an unpleasant and uncomfortable procedure. We do not, however, concede that in *Rochin* a medieval, barbaric instrumentality was used to extract the evidence from Rochin's body and for that reason its use was shocking, brutal, and offensive to common decency and fairness. Gastric lavage (stomach pumping) is standard routine medical procedure used with great frequency in civilized countries. Treatment through the use of gastric or stomach lavage, for example, is recommended for patients suffering from acute alcoholism, methanol intoxication, intoxication by morphine and related alkaloids, and mercury poisoning.

Harrison Principles of Internal Medicine (1950), pp. 735, 737, 747 and 753.

Men of medicine in civilized countries employ the use of the stomach pump.

It is not the use of the stomach pump or gastric lavage itself under ordinary circumstances that is shocking, brutal, or offensive to our concepts of fairness and decency but rather its forcible use by the police to invade Rochin's body against his will and over his protest. Likewise, there is nothing shocking, brutal, unfair or indecent about the injection of a needle into the skin, tissue, and vein under ordinary circumstances. Its use only becomes offensive and shocking when the police forcibly employ this medical procedure to extract blood as evidence over the protests and against the will of petitioner.

(D) The Evidence of the Blood Test Was Unreliable and Should Have Been Excluded.

The lower court should have excluded such evidence not only because of the offensive police conduct but because the evidence was unreliable in that the person who made the analysis did not testify and the criminologist Bradford could not identify who made the analysis of the purported blood sample. (R. 24, 34, 35.)

(E) The Petitioner's Privilege Against Self-Incrimination Was Violated When His Blood Was Extracted Against His Will and Over His Protest.

Blood taken from the veins of the petitioner was inadmissible when taken from him without his consent. The physical coercion and forcible extraction of evidence from the veins of the petitioner by the

use of a needle without the consent of the petitioner compelled him to be a witness against himself in violation of the Fifth and Fourteenth Amendments of the United States Constitution and the admission of such evidence was a violation of the petitioner's constitutional rights.

Rochin v. California, supra (Concurring opinions of Justices Black and Douglas);

Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330;

Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524.

(F) The Forcible Intrusion Upon the Person of the Individual by State Police in This Case Requires the Exclusion of the Evidence Extracted From the Body and a Reversal of the Conviction.

A great concern for the security of the individual in his person and property underlies the Fourteenth Amendment.

In *Wolf v. Colorado, supra,* the late Mr. Justice Jackson commented thusly:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through Due Process Clause."

Notwithstanding, the improper invasion of the individual's privacy as to his papers, records, and documents in his office did not compel the Court to reverse in *Wolf.*

In *Rochin v. California,* however, a unanimous Court elevated the security of the individual in his person against forcible police intrusion to a higher plane than that accorded to him in the security of his property. For the evidence extracted by forceful police methods from Rochin's body was excluded and the conviction reversed.

More recently, this greater concern for the protection of the individual's person was acknowledged in the opinion of the Court in *Irvine v. California,* 347 U.S. 128 when the Court compared the *Irvine* situation with *Rochin.*

> "An effort is made, however, to bring this case under the sway of Rochin * * * That case involved, among other things, an illegal search of the defendant's person. But it also presented an element totally lacking here—coercion applied by a physical assault upon his person to compel submission to the use of a stomach pump. This was the feature which led to a result in Rochin contrary to that in Wolf. Although Rochin raised the search and seizure question, the Court studiously avoided it and never once mentioned Wolf. Obviously, it thought that illegal search and seizure alone did not call for reversal. However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping."

Certainly then in the light of these cases and the Court's concern for the security of the individual's person, the coercive entry of the petitioner's body to extract evidence under the circumstances of this

case will not be upheld and the evidence will be ruled inadmissible and the conviction reversed, notwithstanding that the coercion may not reach the degree of shocking brutality thought necessary by respondent.

(G) Failure of the Trial Court to Give Petitioner's Requested Instructions Relating to the Voluntariness of the Blood Test and the Application of the Rochin Doctrine Was a Violation of Due Process.

The totality of testimony as to what occurred at the police station clearly establishes that the petitioner's blood was taken as a result of coercion. The repeated refusal to submit to the blood test before it was taken, his adamant declination to take any other sobriety tests, his request for legal or medical advice when blood was to be taken—all these facts elicited from the police officers establish that the blood test was taken without his consent. Respondent contends that petitioner finally consented and refers to the officer's testimony that petitioner agreed to the test. In the *Rochin* case, the deputy sheriff testified that Rochin did not protest nor resist when the stomach pump was used while Rochin said by way of stipulated testimony that he never consented and never submitted to the stomach pump. From all the circumstances of this case the Court can find that the petitioner was compelled to submit to the blood test.

Assuming by way of argument that the record reveals a conflict in the evidence as to petitioner's consent, we submit that the issue of voluntariness was not adjudicated below because the trial Court refused

to give petitioner's proposed instructions VIII, IX, X, and XI relating to the voluntariness of the blood test and the Rochin doctrine or any other instructions on these issues.

Petitioner submitted his proposed instructions VIII (R. 144), IX (R. 144), X (R. 144), and XI (R. 144), which embrace the federal question presented herein. These four proposed instructions were refused. (R. 132-137.)

Proposed instruction VIII provided as follows: "A person arrested because it appears that he is intoxicated, has the right to refuse to subject himself to any of the usual tests and to a blood test."

Proposed instruction IX provides as follows: "If any physical or other coercion frowned upon by due process is implied in taking a blood test without the consent and against the protests of a person arrested because it appears that he is intoxicated, the results of such blood test must be disregarded entirely."

Proposed instruction X provided as follows: "It is a denial of due process under the 14th Amendment of the Constitution of the United States and under the due process clause of the Constitution of the State of California, if brutal or shocking force is exerted in obtaining a blood test without the consent and against the protests of the person arrested because it appears that he is intoxicated, and the results of such blood test must be disregarded entirely."

Proposed instruction XI provided as follows: "It is a denial of due process under the 14th Amendment

of the Constitution of the United States if a blood test is exacted of a person arrested because it appears that he is intoxicated, by force and without the consent and against his protests, and the results of such blood test must be disregarded entirely."

No modified instructions embracing these issues were given to the jury. (R. 132-137.)

In coerced confession cases, under California procedure, the question of admissibility in the first instance is for the Court's determination but the jury must determine whether the confession was involuntary.

People v. Fox, 25 Cal. 2d 330, 340 (1944);
People v. Dabb, 32 Cal. 2d 491, 497 (1948).

The Due Process Clause requires that "the state approved instruction fairly raise the question of whether or not the challenged confession was voluntary, * * *"

Lyons v. Oklahoma, 322 U.S. 596, 601 (1944).

Therefore, instructions that fairly raise the voluntariness issue satisfy the 14th Amendment.

In the case before this Court, petitioner was denied an adjudication upon the issue of voluntariness by the trial Court's refusal to give the proposed instructions. The failure to present the voluntariness issue to the jury in any manner was a violation of Due Process.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the conviction of petitioner must be reversed.

Dated, San Francisco, California,
August 22, 1955.

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